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SUPREME COURT, U. S.

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Nos. 73-196 and 73-351

In the Supreme Court of the United States

OCTOBER TERM, 1973

GUS SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

BEN ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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Petitioners contend that comments by the trial court improperly discouraged a codefendant from testifying in their behalf. Petitioner Sclafani also contends that the evidence against him was insufficient on certain counts and that the trial court erred in instructing the jury on conspiracy.

After a jury trial in the United States District Court for the Southern District of New York, petitioner Ross was convicted on three counts of conspiracy and substantive violations of the Extortionate Credit Act (18

U.S.C. 371, 893, and 894), three counts of income tax evasion (26 U.S.C. 7201), and three counts of filing a false and fraudulent income tax return (26 U.S.C. 7206). Petitioner Sclafani was convicted on four counts of conspiracy and substantive violations of the Extortionate Credit Act (18 U.S.C. 371, 893, and 894), two counts of income tax evasion (26 U.S.C. 7201), and one count of making a false statement to the government in connection with his 1970 income taxes (18 U.S.C. 1001).[1] Petitioner Ross received an aggregate sentence of imprisonment for fifteen years and a fine of $90,000; petitioner Sclafani was sentenced to imprisonment for a total of ten years with a fine of $30,000. The court of appeals affirmed in a thorough opinion (Ross Pet. App. 1a-23a; Sclafani Pet. App. 1a-23a).

The facts are recounted at length in the opinion of the court of appeals. They show that, from 1968 to 1971, petitioners and their codefendants loaned large sums of money to Morton Kanoff and Herbert Hurwitz, two building contractors in New York City, at interest rates of more than 3 percent per week, and then collected interest and principal on the loans from Hurwitz and Kanoff by means of physical force and threats of violence, maiming, and even death. There was substantial evidence supporting the jury's finding that the defendants operated together, that they financed the extortionate loans, and that they had the loans delivered to the two borrowers by Joseph Maida, Joseph Randazzo, and petitioner Gus Sclafani.

Petitioner Ross does not dispute the sufficiency of the evidence against him. Several payments from victims

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[1] Three codefendants (Vincent Lore, Joseph Maida, and Joseph Randazzo) pleaded guilty before trial, while a fourth codefendant (Angelo Tuminaro) was a fugitive.

were traced to him, and in August 1971 he acknowledged having participated in a loan of $50,000 to Hurwitz and Kanoff. There was also extensive evidence establishing petitioner Sclafani's role in the extortion operation. He made weekly collections of payments from the borrowers during the period from July to October 1969. He also delivered two cash loans totaling $25,000 to the borrowers and on several occasions told Hurwitz and Kanoff he would break their legs, arms, and heads if they failed to make payments on time.

1. There is no merit to petitioner Sclafani's claim that the evidence against him was insufficient to show that he helped finance the extortionate loans, within the meaning of 18 U.S.C. 893, and that he willfully engaged in income tax evasion. The jury could properly infer from the evidence that Sclafani was engaged with his codefendants in a partnership or profit-sharing venture, pursuant to which money was advanced as a loan, investment, or otherwise to Joseph Randazzo, Joseph Maida, and petitioner Sclafani to use in making extortionate loans to others. Participation in such a joint operation was sufficient action to support a conviction for conspiracy and for the substantive violation of 18 U.S.C. 893. Petitioner Sclafani risked imprisonment for a substantial period of time by reason of the threats of bodily injury which he made to Kanoff and Hurwitz. His delivery of $25,000 in cash to the two victims and his numerous pickups of large interest payments from them raised a permissible inference that he had a stake or proprietary interest in the criminal venture and that he received a portion of the enormous profits generated by it.

It was also reasonable for the jury to conclude that Sclafani willfully evaded his federal income taxes by

reporting income of only approximately $3,000 in 1968 and 1970 and by reporting no income in 1969. In an income tax prosecution, the government need only establish that the amount of taxes evaded was substantial and need not prove the exact amount. *United States* v. *Marcus*, 401 F. 2d 563 (C.A. 2), certiorari denied, 393 U.S. 1023. The government met this burden below, and petitioner Sclafani's conviction for income tax evasion should therefore stand.

2. Petitioners' contention that the trial court violated their rights by threatening to sentence codefendant Vincent Lore more severely if he testified in their defense was thoroughly examined and rejected by the court of appeals in a discussion upon which we rely (Ross Pet. App. 7a-19a; Sclafani Pet. App. 8a-19a). Lore was not intimidated or prevented from testifying. He was available to the defense as a witness at all times during the trial, but petitioners chose not to call him to the stand.[2]

3. Petitioner Sclafani's challenge to the jury charge (Sclafani Pet. 24-27) is also without merit. The trial court correctly instructed the jurors that they could not find a defendant guilty of income tax evasion unless they found that he had taxable income which he know-

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[2] As the court of appeals pointed out (Ross Pet. App. 17a-18a; Sclafani Pet. App. 17a-18a), petitioners' reliance on *Webb* v. *Texas*, 409 U.S. 95, is misplaced. Unlike the judge in *Webb*, the trial judge below did not express or imply any belief that Lore would lie if called to testify. The court did not threaten Lore, but only indicated that final sentencing would be delayed until after petitioners' trial in case Lore did in fact perjure himself. It is significant that, even after the trial court's remarks, counsel for Lore indicated that Lore would respond to any subpoena to testify and would tell the truth if called (Ross Pet. App. 17a; Sclafani Pet. App. 17a).

ingly and willfully failed to report in order to evade payment of a substantial tax due and owing the United States (App. 206).[3] The jury could reasonably infer from the evidence that petitioner Sclafani shared with his codefendants in the proceeds of the extortionate scheme and that his failure to report his share as income was deliberately designed to avoid payment of a substantial federal tax.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[3] "App." refers to the Appendix in the court of appeals.

CERTIORARI DENIED